Supreme Court, U. S.
FILED
JAN 6 1981
MICHAEL RODAK, JR., CLERK

80-1136

No. .....

In the Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,

vs.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

DONALD R. KUNZ
(Counsel of Record)
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

THE QUESTIONS PRESENTED FOR REVIEW

This petition requests the Court to review *two* separate questions.

Can a state, consistently with the due process requirements of the Fourteenth Amendment, confer on a lawyer "*absolute*" privilege to file charges of unethical conduct against another lawyer (his litigation opponent) which were *concededly groundless* and which were made for the *concededly malicious* purpose of delaying the litigation:

> *Question 1*—where the charges were made to the *bar association?*
>
> *Question 2*—where the charges are made to the *court* in which the litigation was pending?

The *effects* of the mere *acts* of *filing* of these two separate charges—without *regard* to their merits—were:

(a) to deprive the accused lawyer's client of his experienced, knowledgeable counsel in the midst of major litigation; and

(b) to deprive the accused lawyer of his long-time, very valuable client without *any* remedy *whatever* for this injury.

By a 3-2 split decision,* the Supreme Court of Arizona has refused to review these questions.

---

*A. 23.

THE PARTIES TO THE PROCEEDING

Petitioner Drummond and Respondent Louis A. Stahl are practicing lawyers, both members of the State Bar of Arizona.

Respondent Streich, Lang, Weeks, Cardon & French, P.A., is the law firm of which Stahl is a partner.

Respondent Mary K. Stahl is the wife of Louis Stahl and is joined only as a member of that marital community.

The State Bar of Arizona filed an *amicus curiae* brief below, but was not a party to the proceedings.

TABLE OF CONTENTS

PETITION—

The Questions Presented for Review I

The Parties to the Proceeding II

Table of Authorities IV

The Opinion Below 1

Statement of Jurisdiction 2

The Constitutional Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 9

Conclusion 14

APPENDIX—

The Opinion Below A1

Other Orders Below and Excerpts Showing How Constitutional Questions Were Raised and Decided A10

Summary Judgment A10

Motion for New Trial (Excerpt) A11

Order Denying New Trial A12

Appellant's Opening Brief (Excerpt) A13

Appellant's Reply Brief (Excerpt) A17

Opinion Below (Excerpt) A19

Motion for Rehearing (Excerpt) A20

Order Denying Rehearing A22

Order Denying Review A23

Mandate A24

Constitutional Provisions and Statutes Involved A25

TABLE OF AUTHORITIES

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 2
Angle v. Chicago St. M. & O. Ry., 151 U.S. 1 9
Bates v. State Bar of Arizona, 433 U.S. 350 14
Forbes Pioneer Boat Line v. Everglades Drainage District, 258 U.S. 338, 339 9
Gibbes v. Zimmerman, 290 U.S. 326 9
Graham v. Goodcell, 282 U.S. 409, 426 9
Kelly v. Perry, 111 Ariz. 382, 531 P.2d 139 11
Middleton v. Wallichs Music & Entertainment Co., Inc., 24 Ariz.App. 180, 536 P.2d 1072 (1975) 9
Paul v. David, 424 U.S. 693 10
Republic National Gas Co. v. Oklahoma, 334 U.S. 62 3
Saf-Gard Products, Inc. v. Service Parts, Inc., 532 F.2d 1266 (9th Cir. 1976), cert.den. 429 U.S. 896 4
Shelley v. Kraemer, 334 U.S. 1 10
Stewart v. Fahey, 14 Ariz.App. 149, 481 P.2d 519 11
Tacon v. Arizona, 410 U.S. 351 3
Town of Chino Valley v. State Land Department, 119 Ariz. 243, 580 P.2d 704 (1978) 9

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1 .....3, 7, 9

STATUTES

Title 28 USC §1257 2
ARS §12-120(A) 2
ARS §12-120.21(A)(1) 2
ARS §12-120.24 2

OTHER AUTHORITIES

12 MOORE ON FEDERAL PRACTICE—

¶508.01[3] 2

¶509.01 2

¶510.01 3

REST. (2d) TORTS §587 11

REST. (2d) TORTS §674 11

No. .....

In the Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,

vs.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

William H. Drummond, your Petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Arizona expressed in its mandate issued October 24, 1980, in the above-entitled case.

THE OPINION BELOW

The opinion of the Court of Appeals of the State of Arizona has not been reported but is set forth in the Appendix, pp. A1-9.

STATEMENT OF JURISDICTION

The Court of Appeals of the State of Arizona has original jurisdiction of all civil appeals from the state's trial court of original jurisdiction, the Superior Court.[1] On appeal from the Superior Court, the Court of Appeals entered its decision adverse to Petitioner on August 19, 1980. A timely Motion for Rehearing[2] was denied[3] on September 24, 1980. Petitioner then filed a timely Petition for Review[4] in the Supreme Court of Arizona. By a 3-2 decision, the Arizona Supreme Court denied review on October 15, 1980.[5] The Court of Appeals then issued its mandate on October 24, 1980.[6]

This Court has jurisdiction under Title 28 United States Code §1257[7] to review the judgment below, in that:

(a) The Court of Appeals is the "highest court" of Arizona "in which a decision could be had", since the Supreme Court of Arizona denied review (*Abood v. Detroit Board of Education*, 431 U.S. 209; 12 MOORE ON FEDERAL PRACTICE ¶509.01);

(b) the mandate of the Court of Appeals is a "final judgment" since it effectively determines this litigation, leaving nothing to be decided in the Arizona courts (12 MOORE ON FEDERAL PRACTICE ¶508.01[3]) and nothing remains to be done there except the ministerial act of entry of judgment on the man-

---

1. ARS §12-120(A) (A25); ARS §12-120.21(A)(1) (A26).
2. ARS §12-120.24 (A26).
3. A22.
4. ARS §12-120.24 (A26).
5. A23.
6. A24-25.
7. A27.

date (*Republic National Gas Co. v. Oklahoma*, 334 U.S. 62); and

(c) Petitioner's privileges and immunities under the Constitution, set up and claimed in this petition, were set up and claimed at every stage of the proceedings below (*Tacon v. Arizona*, 410 U.S. 351; 12 MOORE ON FEDERAL PRACTICE ¶510.01).

THE CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of Section 1 of the Fourteenth Amendment to the Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Preface

This is *not* a libel, slander or defamation case. Petitioner's cause is based on Respondent's *acts* of initiating court and bar association proceedings and the *effects* of these *acts* on Petitioner's *pocketbook*, not upon his professional or personal reputation. The wider effects of Respondent's acts are felt in the public arena—the proper and efficient administration of the judicial system.

Stahl's Groundless Acts and Their Effects

Drummond and Stahl are lawyers who were opponents in a major lawsuit. In the midst of this litigation, Stahl did two things: (1) he filed conflict of interest charges against Drummond with the State Bar of Arizona, *and* (2) he moved the court in which the case was pending to disqualify Drummond as counsel for plaintiff.

Each of these acts had *two* effects: the litigation came to a complete halt, costing Drummond's client over $100,000 in lost income, and Drummond lost his valuable client of many years.

The charges filed by Stahl were investigated by the State Bar of Arizona and found to be *groundless.* In fact, the way this case comes up,[8] Stahl's acts must be taken here as *malicious,* taken for the totally improper purposes of *delaying* the pending litigation by depriving Drummond's client of his knowledgeable, experienced attorney, at the very time he was most needed.

Background Facts

Drummond, a registered patent attorney, had represented a talented inventor,[9] Walter Avrea, for many years until the events of 1976-77 which precipitated this case.

In 1975, Drummond represented Avrea in negotiating a major contract with Saf-Gard Systems, Inc., to commercially exploit all of Avrea's patented inventions. Saf-Gard requested Drummond to represent *both* Avrea and Saf-Gard in litigation involving *infringement* of these patents by others. Drummond agreed to represent both

---

8. A2.

9. See, e.g., *Saf-Gard Products, Inc. v. Service Parts, Inc.,* 532 F.2d 1266, 1269 (9th Cir. 1976), cert.den. 429 U.S. 896.

Avrea and Saf-Gard, but only *after* the potential for a conflict of interest was discussed and resolved and only *after* Saf-Gard, separately represented, *agreed* that if a conflict did arise, Drummond would continue to represent Avrea, his long-time client.

In 1976, the conflict arose. For reasons not material here, Drummond filed a suit on Avrea's behalf against Saf-Gard. This suit involved the *title* to the Avrea patents which Drummond was also attempting to enforce on behalf of *both* Avrea and Saf-Gard in the *infringement* litigation with third parties. Stahl appeared as attorney for Saf-Gard in the action filed by Drummond involving the *title* question.

Several months after Drummond filed the *Avrea v. Saf-Gard* suit, Drummond noticed the deposition of the owner-president of Saf-Gard. *Only then* did Stahl *first* raise the question of Drummond's supposed conflict of interest. He threatened that, unless Drummond immediately withdrew as Avrea's attorney in the *title* litigation, he (Stahl) would file charges of unethical conduct with the Bar and with the court. Stahl, though new on the scene, declined Drummond's invitation to first discuss the matter and filed (1) charges with the Bar Association, and (2) a motion in the court to disqualify Drummond as Avrea's attorney.

The Bar thoroughly investigated Stahl's charges and "concluded that there was no conflict of interest and the Bar found no probable cause to proceed against Drummond".[10] But, in the meantime, Stahl's tactics were successful: Avrea's litigation with Saf-Gard was stalled and he lost his royalty income. As Avrea put it:

> A. (Mr. Avrea) That regardless of whether there was any conflict of interest or not, I think you

---

10. A4.

and I discussed it, it allowed them to delay us eight or ten months without being able to proceed and get back my only source of income as my patents. I believe that eight or ten month delay cost us well over $100,000 income from those patents. I think you realize that. I think the expense of having to go through and bring somebody else up to date while the Arizona Bar Association was hearing this conflict charge, that I had to pursue and I had to start from ground zero and educate people of the things that happened over a period of time when you were my representative whereas all this time I counted on you being there because you were present in all these meetings and see the negotiations in the various things.

Q. (Mr. Drummond) When you say bring other people up to date, you mean other attorneys?

A. Replacement counsel, yes, and as I say, losing eight or ten months while the Arizona Bar decided what in the hell to do.

Because of this delay, Avrea was forced to obtain other counsel to continue the litigation and, as a direct consequence, his attorney-client relationship with Drummond, which had existed for many years, was destroyed.

History of This Litigation

After Drummond lost his long-time client, he filed this action against Stahl in the state courts of Arizona. The suit alleged that Stahl tortiously interfered with the attorney-client contractual relationship between Drummond and Avrea, that Stahl's acts were malicious and that these acts were the direct and proximate cause of the destruction

of the contractual relationship between Drummond and his client.

Stahl moved for summary judgment, claiming "absolute privilege". Drummond resisted this motion on the ground that Stahl's acts were, at most, conditionally privileged and that such conditional privilege required the trier of fact to determine Stahl's state of mind, a fact placed in sharp dispute by the motion papers and Drummond's response.

The trial court granted summary judgment,[11] denied a new trial[12] and Drummond appealed to the Court of Appeals for the State of Arizona. In this appeal, Stahl and the State Bar of Arizona, *amicus curiae*, argued that he was entitled to "absolute privilege". Drummond argued (1) that the privilege, if any, was "conditional", (2) that summary judgment was inappropriate in view of the sharp dispute as to Stahl's state of mind, and (3) that if the court ignored Stahl's state of mind and applied "absolute privilege" in the face of malice, this would violate Drummond's privilege against deprivation of property without due process of law under the Fourteenth Amendment.

The Court of Appeals[13] applied "absolute privilege" to *both* of Stahl's acts, the bar complaint[14] and the motion in court to disqualify Drummond,[15] notwithstanding that malice was assumed as a fact. In his motion for rehearing, Drummond specifically pointed out that the Court of Appeals had erred on the Constitutional question.[16] The Court

---

11. A10.
12. A12.
13. A1-9.
14. A7.
15. A6.
16. A20.

of Appeals denied Drummond's motion for rehearing.[17] A petition for review was filed in the Supreme Court of Arizona, which considered the matter on the basis of the record before the Court of Appeals,[18] which included Drummond's motion for rehearing which had emphasized the Constitutional issue.

By a 3-2 decision, the Supreme Court of Arizona denied review.[19] The Court of Appeals then issued its mandate[20] directing entry of judgment against Petitioner.

Statement Under Rule 21.1(h)

Petitioner raised the federal questions on which he seeks this review, as follows:

(1) *in the court of first instance,* by a timely Motion for New Trial,[21] which was denied;[22]

(2) *in the intermediate Court of Appeals,* by arguments in Appellant's Opening Brief[23] and in Appellant's Reply Brief[24] which were rejected in the opinion below[25] and by a timely Motion for Rehearing[26] which was denied;[27] and

(3) *in the Supreme Court of Arizona,* by a timely Petition for Review, which was denied.[28]

---

17. A22.
18. A23.
19. A23.
20. A24.
21. A11.
22. A12.
23. A13-16.
24. A17-18.
25. A1-9.
26. A20.
27. A22.
28. A23.

REASONS FOR GRANTING THE WRIT

Background Principles

The law has historically provided a cause of action for damages for tortious interference with contract relationships (*Angle v. Chicago, St. M. & O. Ry.*, 151 U.S. 1) and such an action is routinely recognized under Arizona law (*Middleton v. Wallichs Music & Entertainment Co., Inc.*, 24 Ariz.App. 180, 536 P.2d 1072 [1975]).

Constitutional Principles

A cause of action is "property" under the Fourteenth Amendment which is beyond the power of the state to take without due process of law. *Graham v. Goodcell*, 282 U.S. 409, 426 (cause of action for amount due under contract); *Forbes Pioneer Boat Line v. Everglades Drainage District*, 258 U.S. 338, 339 (cause of action for tolls unlawfully collected under state statute); *Angle v. Chicago, St. M. & O. Ry., supra*, 151 U.S. at 25-26 (cause of action for tortious interference with contract).

The Constitution does not require a state to provide a damaged party any *particular remedy* for a cause of action, nor does it require that a state provide any *particular procedure* to obtain that remedy, but the Fourteenth Amendment *does* guarantee the preservation of *some substantial* right to redress by *some effective* procedure (*Gibbes v. Zimmerman*, 290 U.S. 326) or, as the Arizona Supreme Court, sitting *in banc*, said (following *Gibbes*):

> *"an efficacious remedy."* (Emphasis added).

(*Town of Chino Valley v. State Land Department*, 119 Ariz. 243, 580 P.2d 704 [1978]).

The Private Effect of the Decision Below

The State of Arizona, through "state action" by its courts (*Shelley v. Kraemer*, 334 U.S. 1; *Paul v. David*, 424 U.S. 693) has violated this fundamental tenent of Constitutional law by judicially conferring *absolute* privilege on Stahl, depriving Drummond of *any remedy* whatever in *any* forum under *any* process of law under *any* conceivable state of fact.

The Public Effect of the Decision Below

The "public policy" *reasons* advanced by the court below for conferring this "*absolute* privilege" are so shallow as to be "all surface", and we respectfully submit, are legally unsound and factually uncompelling. The *result* of the holding below will not *subserve* but will actually *subvert* strong public interests.

The Decision and Its Ramifications in Litigation

The present decision of the court below announces *two* new "rules of the road" in litigation practice.

The first new rule says that an attorney can, with *impunity*, without *any* truthful cause, in violation of his sworn duty as an officer of the Court, and directly contrary to both Federal and State Rule 11(a) of Civil Procedure, delay *any* court proceeding by the simple device of moving the court to disqualify opposing counsel on *false* allegations of conflict of interest. He is "absolutely privileged" to do this.

To reach this result, the court below had to abolish the distinction between wholly different causes of action (i.e., defamation, on the one hand, as against tortious interference on the other hand) which has been recognized

in Arizona[29] and by the RESTATEMENT[30] for decades and which has been recognized at common law for perhaps centuries. The court below *recognized* the distinction but dismissed it with the following few words:

> "Although these Arizona cases[31] (involving libel and slander) do not directly involve a case of tortious interference . . . (they) control the disposition of this case." (A6, paraphrased)

The second new rule says that an attorney who is schooled in, tested by bar examination upon, and expected to thoroughly understand the principles of legal ethics can, *with impunity,* knowingly and for improper purposes, file false charges of unethical conduct with the state bar against his litigation opponent, cause the most significant professional and financial damage to his fellow lawyer, and, most importantly, effectively deprive the opposing *party* of his experienced, long-time counsel! Again, he is "absolutely privileged" to do this, and neither the lawyer thus accused nor the client thus deprived has any remedy!

This second new rule of the "litigation road" is again based on the abolition of the previously clear distinction between a cause of action for defamation and a cause of action for tortious interference and upon the further ground of "public policy".

---

29. *Stewart v. Fahey,* 14 Ariz.App. 149, 481 P.2d 519, cited with approval by the Arizona Supreme Court in *Kelly v. Perry,* 111 Ariz. 382, 531 P.2d 139.

30. The RESTATEMENT provides absolute privilege for *defamatory statements* in court proceedings [REST. (2d) TORTS §587] but only a conditional privilege for "wrongful institution of proceedings" [REST. (2d) TORTS §674].

31. All of the other cases from other jurisdictions cited in the decision below are, similarly, libel and slander cases rather than cases dealing with tortious interference or wrongful institution of proceedings, civil malicious prosecution, etc.

The "public policy" argument (advanced by the State Bar of Arizona as *amicus curiae* and adopted by the court below) is an abject confession of the inability or the failure of the court below to distinguish between "conditional" and "absolute" privilege—concepts which are *routinely* applied when the litigants are *private* parties—when the litigation instead involves lawyers. The second new rule goes far beyond what is required to avoid "chilling" effects and even *further* beyond what is required to enable the bar to

> "continue to enjoy the privilege of a self-regulating profession." (A8)

An "absolute" privilege may *need* to be extended, as we acknowledged below, to complaints by *laymen*—but why to lawyers? Are not lawyers to be held to the highest standards, in view of the *powers* which their privileges *as lawyers* entitle them to *wield*? And if that be true, *despite* those privileges *as lawyers,* are lawyers then simply to be "lumped together" with the "general public" so far as immunities are concerned? The State Bar of Arizona, in its brief *amicus curiae* below, *urged just that*:

> "We are not concerned with just the immunity of lawyers but of the *public generally,* of which the *lawyers* constitute but a *small part.*" (Emphasis added)

The court below agreed with the position of *amicus curiae* by drawing no distinction between a lawyer, on the one hand, and the "general public" on the other hand, thus conferring upon lawyers the *same immunities* belonging to the general public. We respectfully disagree with that premise. It is *just plain wrong* for lawyers, as a class, to claim the *powers* of that class, which in no sense are enjoyed by the general public, but then to attempt to seek the *immunities* of the "general public" when called to account for the *wrongful exercise of those powers.*

The public will *not* be the beneficiary of these two new rules. Instead, it will be the marginal lawyer, who is not ready for trial (or would simply like to compel a change of opposing counsel) or the marginal client, whose only hope is delay, who will benefit. The public will *pay,* not *benefit,* from these delays.[32] These new rules unquestionably *invite* delay with its increased litigation costs and *invite* congestion of court calendars and thereby would *discourage and defeat* the right of the public to ready, speedy access to our courts, and to the services of the attorney of one's own choosing. Surely the legal profession is not so ineffective in dealing with itself that it cannot fashion rules of conduct for lawyers which will not *invite* such consequences.

The answer, as to *lawyers,* is clear and apparent: It is *conditional* privilege. If the delays, increased cost and congestion of litigation calendars invited by the decision below are to be avoided, considerations of sound public policy dictate that counsel who wrongfully utilize court and bar association procedures for such delay be held *personally accountable* for the damage they cause, a result which can only be reached if *conditional* privilege is applied.

The court below has decided specific, important questions of federal Constitutional law. In so deciding, the court below ignored applicable decisions of this Court be-

---

32. Report of Bar Counsel to the State Bar of Arizona:

"One cannot avoid considering the interest of Avrea [Drummond's client in the case in which Drummond's disqualification was urged] in this situation. For many years, he had relied on the advice and guidance of Drummond. He undoubtedly believed that Drummond was his attorney throughout the period of his association with Systems. *He should not be told to abandon him and seek other counsel unless strong and compelling reasons under the Code of Professional Responsibility can be found.*" (Emphasis ours)

cause, *factually,* they were not *squarely* on point. These federal questions should be settled by this Court because

(1) this Court has not decided these questions,

(2) there is a split of authority among the courts of last resort of the States on these questions (A8),

(3) the decision below does not even satisfactorily resolve these questions in Arizona, due to the split 3-2 decision (A23) of the Arizona Supreme Court not to review the decision of the intermediate Court of Appeals, and

(4) wholly aside from the private effect on petitioner's constitutional rights, the decision below has broad and *unfortunate* implications in the public arena which is the direct responsibility of this Court—the effective, timely and efficient administration of the judicial system.

CONCLUSION

We urge that the court below glossed over and erred on a basic *Constitutional* issue dressed in the sheep's clothing of a mere "private" issue. *Legally,* it is no answer that private interests must give way to "public policy" when the private interests are Constitutionally guaranteed. And, *practically,* the protection of *private* Constitutionally guaranteed interests has a curious way of turning out to be the best way of protecting the *public* interest. *Bates v. State Bar of Arizona,* 433 U.S. 350.

We respectfully urge the Court to grant this Petition for a Writ of Certiorari.

DONALD R. KUNZ
3003 N. Central Avenue
Phoenix, Arizona 85012
Counsel for the Petitioner

APPENDIX

THE OPINION BELOW

(Filed August 19, 1980)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
1 CA-CIV 4531
DEPARTMENT C

WILLIAM H. DRUMMOND,
Plaintiff-Appellant,

v.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STRETCH, LANG, WEEKS, CARDON AND FRENCH, a Professional Association,
Defendants-Appellees.

OPINION

An Appeal from the Maricopa County Superior Court
Cause No. C-362697
The Honorable Rufus C. Coulter, Jr., Judge

AFFIRMED

O G G, Chief Judge

The appellant/plaintiff, William H. Drummond, brought suit in the Maricopa County Superior Court alleging a tortious interference by the appellees/defendants with an attorney-client contractual relationship of which Drummond, as a practicing member of the State Bar of Arizona, was the beneficiary. Drummond asserts the ele-

ments of such a cause of action are set forth in the case of *Middleton v. Wallich's Music & Entertainment Company, Inc.*, 24 Ariz.App. 180, 536 P.2d 1072 (1975). The defendant, Louis A. Stahl, is also a practicing member of the State Bar of Arizona. The remaining defendants are Stahl's law firm, a professional association, and his wife. After all pleadings were filed, the trial judge granted defendants' motion for summary judgment and plaintiff filed this appeal. The State Bar of Arizona was granted permission by this court to file an Amicus Curiae brief and participate in oral argument of this appeal.

Drummond sets out the two threshold issues to be determined as:

1. Are Stahl and his law firm "absolutely privileged" to institute disqualification proceedings in the trial court to prevent Drummond's further participation in pending civil litigation?

2. Are Stahl and his law firm "absolutely privileged" under the facts of this case to file charges of unethical conduct against Drummond with the State Bar of Arizona?

In this appellate review of the summary judgment, we must view the evidence and the inferences to be drawn therefrom in a light most favorable to the appellant. *Poggi v. Kates,* 115 Ariz. 157, 564 P.2d 380 (1977); *Riedisser v. Nelson,* 111 Ariz. 542, 534 P.2d 1052 (1975). Viewing the evidence in such a manner, it appears that Drummond was hired as a patent attorney by Walter C. Avrea and had a contractual attorney-client relationship with Avrea dating back to 1965. Drummond also represented both Avrea and a corporation, known as Saf-Gard Systems, Inc., in protecting Avrea's inventions which were licensed to Saf-Gard, and in certain other patent infringement actions

where Avrea and Saf-Gard had similar interests. Drummond's representation of both Avrea and Saf-Gard was undertaken only after the possibility of a future conflict of interest was discussed by all parties and their attorneys. It was determined there was no conflict of interest in these limited areas, and if a conflict of interest did arise between Avrea and Saf-Gard, that Drummond would continue to represent his old client, Avrea.

On February 25, 1976, Drummond filed a Maricopa County Superior Court action on behalf of Avrea and others against Saf-Gard and others. On May 13, 1976, Stahl, representing Saf-Gard, notified Drummond's office by a hand-delivered letter that Drummond must withdraw as Avrea's attorney on the ground of a conflict of interest with Saf-Gard. The letter further notified Drummond that unless he withdrew from the litigation, Stahl would file charges of unethical conduct against him with the State Bar of Arizona. According to Stahl's affidavit, this letter had been prompted by notification to Stahl by Saf-Gard that Drummond had previously represented Saf-Gard and possessed confidential information that would be detrimental to Saf-Gard in the pending litigation with Avrea.

Before responding to Stahl's letter, Drummond filed a complaint against Stahl with the State Bar of Arizona and enclosed a copy of such complaint along with his reply letter which stated:

> "If you want to go ahead and file the complaint, be my guest. However, if you have any interest in confirming whether you have all of the facts, please call me and we can arrange a time for you to confer with me before taking precipitous action."

When Drummond failed to withdraw as requested, Stahl did not further contact Drummond, but proceeded to

file a complaint with the State Bar of Arizona. Stahl also filed a superior court motion to compel Drummond to withdraw from the pending *Avrea v. Saf-Gard* litigation. Thereafter Drummond withdrew from representing Saf-Gard in two pending patent infringement actions against third parties, while continuing his representation of Avrea.

While the Stahl complaint was pending, Drummond was requested by Saf-Gard to perform certain patent services in other cases which were in fact performed. Sometime later he withdrew from all representation of both Avrea and Saf-Gard. Upon stipulation of counsel, Stahl's superior court motion to disqualify Drummond was postponed indefinitely.

It appears that prior to Stahl's complaint with the Bar Association, Drummond had always had a good attorney-client relationship with Avrea, although Avrea owed him substantial unpaid attorney fees. The Stahl complaint and motion caused Avrea delay in his litigation while the State Bar of Arizona investigated the complaint. Because of this delay, Avrea requested that Drummond withdraw as his counsel so that new counsel could be retained to recommence the diligent prosecution of the case. After many months, with no payments on Avrea's past-due balance, Drummond filed an action to recover past-due attorney fees and expenses.

The Drummond complaint against Stahl was dismissed by the State Bar. The Stahl conflict of interest complaint against Drummond was investigated by counsel for the Arizona State Bar. The Bar counsel concluded that there was no actual conflict of interest and the Bar found no probable cause to proceed against Drummond.

In an affidavit filed by counsel for the State Bar of Arizona, the following pertinent conclusions were found:

"3. In the course of my investigation as bar counsel, I discussed Mr. Stahl's complaint with Mr. Stahl and Mr. Jock Patton of Mr. Stahl's firm. Based upon such discussions and my review of those documents and materials which I considered material and relevant to the complaint, it is my opinion that Mr. Stahl's complaint was brought in good faith.

4. Based upon my efforts in connection with my activities as bar cuonsel, including both legal and factual analysis, Mr. Stahl's complaint was not frivolous. It is my opinion that reasonable minds of the bar could differ as to whether there existed an ethical breach, even though it was my opinion that there was no actual conflict of interest. The issues were difficult and I did substantial deliberation on this matter."

It is Drummond's position that Stahl, while acting on behalf of his marital community and as agent of his firm, intentionally and maliciously induced or caused a breach or termination of the Avrea/Drummond attorney-client relationship, resulting in the loss of the monetary and professional expectancies to be derived therefrom.

It is Stahl's position that the motion to require Drummond to withdraw from the superior court action and the complaint filed with the State Bar of Arizona were absolutely privileged and that Drummond has no cause of action.

WAS THE SUPERIOR COURT MOTION ABSOLUTELY PRIVILEGED?

It is our opinion that the motion filed by Stahl, on behalf of his client Saf-Gard, to compel Drummond to withdraw as Avrea's attorney in the pending *Avrea v. Saf-Gard* litigation was privileged under the facts of this case.

An affirmative defense, such as privilege, may be raised and determined on a motion to dismiss, where the facts constituting the defense appear in the pleadings. *Sierra Madre Development, Inc. v. Via Entrada Townhouses Association,* 20 Ariz. App. 550, 514 P.2d 503 (1973). From our reading of the pleadings and affidavits filed in the motion for summary judgment, it appears there were sufficient undisputed facts from which the trial judge could grant summary judgment.

The allegation in the motion to compel Drummond to withdraw on the grounds that he had a conflict of interest is the type of defamatory statement in litigation proceedings that should be absolutely privileged. Defamatory statements contained in pleadings are absolutely privileged if they are connected with or have any bearing on or are related to the subject of inquiry. *Sierra Madre Development, Inc. v. Via Entrada Townhouses Association. See Restatement (Second) of Torts* § 587 (1977). Parties to judicial proceedings are generally granted an absolute privilege to use defamatory language in pleadings because of an "overriding public interest" that persons should speak freely and fearlessly in litigation. *Stewart v. Fahey,* 14 Ariz. App. 149, 150, 481 P.2d 519, 520 (1971). A statement made in the course of a judicial hearing is absolutely privileged as long as it bears some relation to the subject judicial proceeding. *Todd v. Cox,* 20 Ariz. App. 347, 512 P.2d 1234 (1973).

Although these Arizona cases do not directly involve a case of tortious interference with a contractual relationship, the reasoning and legal principles set out have application to and control the disposition of this case. The motion to force Drummond to withdraw as counsel had a direct relationship to the superior court proceedings and under the facts of this case was entitled to an absolute privilege.

WAS THE STAHL COMPLAINT TO THE ARIZONA STATE BAR ABSOLUTELY PRIVILEGED?

Both Drummond and Stahl make basically the same arguments relative to this issue that they made to the first issue. The State Bar of Arizona contends that public policy dictates that there must be immunity to all persons from any liability arising from the filing of a complaint with the State Bar which charges an attorney with unethical conduct. Drummond agrees there is a "conditional" privilege, both as to the making of a report of Drummond's supposed unethical conduct to the Bar Association and as to the initiation of proceedings to disqualify Drummond as Avrea's counsel in the superior court. Drummond further argues that these conditions include factual considerations such as the truth or falsity of the matters alleged, the motives of the defendant, the existence or non-existence of probable cause, and the question of whether such conduct involved legal malice. Drummond concludes that until such factual matters are determined by a trial, the granting of summary judgment is in error.

The State Bar answers this argument by stating that to allow a "conditional" privilege would allow the institution of a civil action by the mere addition of an "actual malice" allegations. This would permit a civil action against anyone who has complained to the State Bar and subject such complainant to the full, expensive scope of discovery and litigation, thus "chilling" the motivation of those who believe they have knowledge of improper legal behavior.

In our opinion, public policy and legal precedent compel us to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney.

The State Bar of Arizona is an arm of the Arizona Supreme Court. *Bridegroom v. State Bar,* 27 Ariz. App. 47, 550 P.2d 1089 (1976). The Supreme Court has directed that written complaints against lawyers are to be filed with the State Bar. Ariz. Sup.Ct. Rule 33(a)1. The State Bar acts in a judicial capacity in dealing with the conduct of attorneys. *Wiener v. Weintraub,* 22 N.Y.S.2d 330, 239 N.E.2d 540 (1968); *Baggott v. Hughes,* 34 Ohio Misc. 63, 296 N.E.2d 696 (1973). The *Restatement (Second) of Torts* (1977), §§ 585-589, grants an absolute privilege for defamatory statements made in a judicial proceeding, so long as such statements bear some relationship to the proceedings.

Although there is some authority to the contrary, *Lee v. W. E. Fuetterer Battery & Supplies Company,* 323 Mo. 1204, 23 S.W.2d 45 (1929); *Sassower v. Himwich,* 236 N.Y.S. 2d 491 (1962), the majority of courts that have faced this issue have held there is an absolute privilege for anyone who files a complaint alleging unethical conduct by an attorney with a State Bar Grievance Committee. *Wong v. Schorr,* 51 Hawaii 608, 466 P.2d 441 (1970); *Richeson v. Kessler,* 73 Idaho 548, 255 P.2d 707 (1953); *Kerpelman v. Bricker,* 23 Md.App. 628, 329 A.2d 423 (1974); *Wiener v. Weintraub*; *McCurdy v. Hughes,* 63 N.D. 435, 248 N.W. 512 (1933); *Ramstead v. Morgan,* 219 Ore. 383, 347 P.2d 594 (1959).

We must weigh the possible harm to attorneys in the filing of a malicious complaint against the need to encourage the reporting of unethical conduct. In weighing these conflicting interests, it is our opinion that public policy demands the free reporting of unethical conduct if we are to continue to enjoy the privilege of a self-regulating profession.

Drummond makes a further argument that any action by the State of Arizona by either legislative enactment or judicial decision to grant an absolute privilege would amount to state action depriving Drummond of due process of law and equal protection of the laws as guaranteed by the 14th Amendment, Section 1 of the United States Constitution, and by the parallel provisions of Article 2, §§ 4 and 13 of the Arizona Constitution.

We have been cited to no reported cases supporting such a theory and have been unable to find any such cases. The existence of such an absolute privilege has been upheld by the majority of states that have considered this issue, and we see no validity to this challenge on constitutional grounds.

The decision of the trial court granting summary judgment is affirmed.

Jack L. Ogg, Chief Judge
Division One

Concurring:

Joe W. Contreras, Presiding Judge
Department C
Eino M. Jacobson, Judge

OTHER ORDERS BELOW AND EXCERPTS SHOWING HOW CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED

SUMMARY JUDGMENT

(Entered April 12, 1978)

THE SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

No. C 362697 (Assigned to the Honorable Rufus C. Coulter - Div. 21)

William H. Drummond,
Plaintiff,

vs.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON & FRENCH, a professional association,
Defendants.

JUDGMENT

This matter having come before the court on defendants' motion for summary judgment on March 24, 1978, the court having heard at that time oral argument of counsel, the court having taken the matter under advisement, and the court having given full consideration to the matter,

IT IS ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff.

DATED this 5 day of April, 1978.

Rufus C. Coulter, Jr.
Judge of the Superior Court

EXCERPT FOR MOTION FOR NEW TRIAL IN COURT OF FIRST INSTANCE

(Filed April 18, 1978)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

No. C-362697

WILLIAM H. DRUMMOND,
Plaintiff,

vs.

LOUIS A. STAHL, et ux., et al.,
Defendants.

MOTION UNDER RULE 59 A.R.C.P. FOR NEW TRIAL

NOW COMES PLAINTIFF and respectfully moves the Court for a new trial of this action on the ground that the Judgment entered April 5, 1978 is contrary to law, in the following respects:

* * * * *

3. The Summary Judgment of April 5, 1978, granting Defendant Stahl absolute immunity (as set forth in ground No. 2 above), is state action depriving Plaintiff of equal protection of the laws and due process of law as set forth in the 14th Amendment (Section 1) of the Constitution of the United States of America and the parallel provisions of the Constitution of the State of Arizona. (Par. 3, p. 2, Motion for New Trial)

ORDER DENYING NEW TRIAL

(Entered June 14, 1978)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

No. C-362697

WILLIAM H. DRUMMOND,
Plaintiff,

vs.

LOUIS A. STAHL, et ux., et al.,
Defendants.

ORDER

Plaintiff's Motion for New Trial and Defendants' Response thereto having been considered by the Court, and the Court having heard the arguments of counsel thereon, and being fully advised in the premises:

IT IS HEREBY ORDERED that Plaintiff's Motion for a New Trial is denied.

DONE IN OPEN COURT THIS 14 DAY OF JUNE, 1978.

Rufus C. Coulter, Jr.
Judge of the Superior Court

EXCERPT FROM APPELLANT'S OPENING BRIEF

IN THE COURT OF APPEALS OF THE
STATE OF ARIZONA
Division One

No. 1CA-CIV 4531

(Maricopa County Superior Court Cause No. C 362967)

WILLIAM H. DRUMMOND,
Appellant,

vs.

LOUIS A. STAHL and MARY KATHLEEN STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Appellees.

Plaintiff-Appellant, William H. Drummond, appeals to the Court of Appeals of the State of Arizona, Division One, from the Judgment of the Superior Court of Maricopa County, Honorable Rufus C. Coulter, Jr., presiding, entered pursuant to an Order granting Summary Judgment in favor of Defendants-Appellees and from the subsequent Order denying Plaintiff's Motion for New Trial.

* * * * *

V. APPLICATION OF AN "ABSOLUTE PRIVILEGE" TO STAHL'S ACTIONS WOULD CONSTITUTE "STATE ACTION" DEPRIVING DRUMMOND OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

If the action of the Trial Court in granting Defendants' Motion for Summary Judgment is sustained on a theory of "absolute privilege", then the granting of sum-

mary judgment by the Trial Court and the affirmance of that action by this Court constitutes state action denying Drummond due process of law and equal protection of the laws as guaranteed by the 14th Amendment (Section 1) of the United States Constitution and by the parallel provisions (Article 2, §4 and §13) of the Constitution of the State of Arizona.

Section 1 of the 14th Amendment to the Constitution of the United States provides, *inter alia*:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is clear that the law of the State of Arizona provides a cause of action for damages for tortious interference with advantageous contractual relationships. See, e.g., *Middleton v. Wallichs Music & Entertainment Co., Inc.*, cited *supra* page 24. This cause of action is a vested "property" right which is protected against impairment by state action under the 14th Amendment. *Terraccioma v. Magee,* 148 A.2d 68, 53 N.J.Super 557 (1959); *Bush v. Reid,* 516 P.2d 1215 (Alaska 1973) and it is clear that the action of the Court below and any action of this Court applying an "absolute" immunity rule would constitute "state action"; *Shelley v. Kraemer,* 68 S.Ct. 836, 92 L.Ed. 1161, 334 U.S. 1 (1948); *Paul v. Davis,* 96 S.Ct. 1155, 47 L.Ed.2d 405, 424 U.S. 693 (1976); *National Airport Corp. v. Wayne Bank,* 252 N.W.2d 519 (Mich. App. 1977); *United States v. Standard Oil Co. of California,* 21 F.Supp. 645 (D.C.Cal. 1938), aff'd 107 F.2d 402 (9th Cir. 1940).

While neither the Federal nor the State Constitutions require that a state provide any *particular* procedure or *particular* remedy to a plaintif who is injured by tor-

tious conduct of another, they do guarantee the preservation of a *substantial* right to redress by some *effective* procedure. *Gibbes v. Zimmerman,* 54 S.Ct. 140, 78 L.Ed. 342, 290 U.S. 326 (1933).

Applying the foregoing principles, the courts have condoned state action which places limitations upon liability of governmental officers and private persons or firms, so long as the limitations were *reasonable.* For example, a reasonable (6-year) period of limitations on a claim for medical malpractice is not a denial of due process or equal protection, *Landgraff v. Wagner,* 26 Az.App. 49, 546 P.2d 26 (1976) but a general and very *short* (120-day) statute of limitations on tort claims against political subdivisions and municipalities was held unconstitutional as applied to claims by minors as a denial of due process, *Hunter v. North Mason High School,* 529 P.2d 898, 12 Wash.App. 304 (1974), aff'd. 539 P.2d 845, 85 Wash.2d 810 (1975).

And an Illinois statute conferring conditional immunity from tort liability on employees of a political subivision was held constitutional *only* as it permitted escape from liability for simple negligence and did not attempt to confer immunity for willful or wanton negligence, *Sullivan v. Midlothian Park District,* 52 Ill.2d 271, 281 N.E.2d 659 (1972). But state action authorizing immunity from civil damages for libel if a newspaper *merely* published a retraction was invalid as a denial of due process, *Byers v. Meridian Printing Co.,* 95 N.E. 917 (Ohio, 1911).

As noted above, Plaintiff-Appellant does not seek a ruling of this Court that Defendant Stahl's activities were *wholly* unprivileged, and we *acknowledge* the undoubted existence of a *conditional* privilege, both as to the making of a report of Drummond's supposed unethical conduct to the Bar Association and as to the initiation of proceedings

in the Superior Court to disqualify Drummond as Mr. Avrea's counsel. The "conditions", however, upon which such privilege must be founded must include factual considerations of the truth or falsity of the matters alleged, the purpose or motive of the Defendant, the existence or non-existence of probable cause and, without doubt, the question of whether such conduct involved legal malice. Any action by the State of Arizona, by either legislative enactment or judicial decision, to remove such considerations from a determination of the actor's liability, i.e., the imposition of a theory of "absolute" privilege, would amount to clear "state action" which deprives Drummond of due process of law and the equal protection of the laws. (Appellant's Opening Brief, pp. 37-41)

EXCERPT FROM APPELLANT'S REPLY BRIEF

IN THE COURT OF APPEALS
OF THE
STATE OF ARIZONA
Division One

No. 1 CA-CIV 4531

(Maricopa County Superior Court Cause
No. C 362697)

WILLIAM H. DRUMMOND,
Appellant,

vs.

LOUIS A. STAHL and MARY KATHLEEN STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Appellees

---

* * * * *

We have but one further comment: This Reply Brief does not address itself to the Constitutional considerations raised in the Opening Brief due only to the fact that that issue was *not* addressed in the Appellees' Answering Brief [except for Appellees' notation that Appellees were aware of no similar case which "has ever been challenged on Constitutional grounds"; (AB11)]. Matters of Constitutionality are not, of course, confined to matters "heretofore raised"; if they were, Arizona juries in negligence cases would probably still be instructed that they "must" re-

turn a verdict for the defendant if plaintiff was found to be contributorily negligent in any degree (a practice which was consigned to "past history" when this Court first comprehensively addressed the problem in *1956* in the case of *Wolfswinkel v. Southern Pacific Co.*, 81 Ariz. 302, 305 P.2d 447, notwithstanding that the Constitutional provision *resulting in the change of practice* had been enacted in 1910!) Appellant respectfully submits, of course, that if disposition of the "threshold issues" of this action involve a conference upon Appellees of "absolute immunity", then the Constitutional issues raised in Appellant's Opening Brief ought properly to be met. (Appellant's Reply Brief, pp. 34-35)

EXCERPT FROM THE OPINION BELOW

(Filed August 19, 1980)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CIV 4531

DEPARTMENT C

WILLIAM H. DRUMMOND,
Plaintiff-Appellant,

v.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON AND FRENCH, a Professional Association,
Defendants-Appellees.

OPINION

* * * * *

Drummond makes a further argument that any action by the State of Arizona by either legislative enactment or judicial decision to grant an absolute privilege would amount to state action depriving Drummond of due process of law and equal protection of the laws as guaranteed by the 14th Amendment, Section 1 of the United States Constitution, and by the parallel provisions of Article 2, §§ 4 and 13 of the Arizona Constitution.

We have been cited to no reported cases supporting such a theory and have been unable to find any such cases. The existence of such an absolute privilege has been upheld by the majority of states that have considered this issue, and we see no validity to this challenge on constitutional grounds.

EXCERPT FROM MOTION FOR REHEARING

IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE

1 CA-CIV 4531

DEPARTMENT C

Maricopa County Superior Court No. C-362697

WILLIAM H. DRUMMOND,
Plaintiff-Appellant,

vs.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON AND FRENCH, a professional association,
Defendants-Appellees.

MOTION FOR REHEARING

Plaintiff-Appellant respectfully moves the Court, pursuant to Rule 22(a), A.R.C.P., for rehearing and reconsideration of its decision filed August 19, 1980.

* * * * *

The Constitutional Issue

As set forth above, we respectfully urge that the Court of Appeals erred in its decisions of "public" issues of this appeal.

Just as respectfully, we urge that the Court of Appeals glossed over and erred on a *basic constitutional issue* dressed in the sheep's clothing of a mere "private" issue.

The clear effect of the present decision of the Court of Appeals is that Plaintiff-Appellant, who suffered undisputed and significant financial damage at Defendant-Appellee's hands, is absolutely *barred* from *any* remedy. And this result is reached *only because* he is a lawyer, *not* a layman.

The cases cited in our Opening Brief (please see pp. 37-41) clearly demonstrate that a State *cannot*, under the 14th Amendment, Section 1, of the United States Constitution, wreak these effects. It may be true that neither we nor the Court could find the "spotted calf" case, but the principles established by the cases we *did* find and cite are clearly applicable under the facts of this case. Drummond *cannot* be deprived of *some* form of remedy and he *cannot* be so deprived either because *he* is a lawyer or *Stahl* is a lawyer, when other plaintiffs who are *not* lawyers have immediate recourse and where other defendants who are not lawyers have, at most, only a *conditional* privilege.

The lack of cases squarely on point is not enough to justify a denial of due process or equal protection. The same might have been and probably has been said in virtually *every* case where a previously unasserted right sought Constitutional recognition for the first time. It is no answer that a private interest must give way to "public policy" when the private interest is Constitutionally guaranteed. The protection of *private* Constitutionally guaranteed interests has a curious way of turning out to be the best way of protecting the *public* interest, as is amply illustrated by the jurisprudence history of these United States.

ORDER DENYING MOTION FOR REHEARING

(Entered September 24, 1980)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CIV 4531

DEPARTMENT C

MARICOPA County Superior Court
No. C-362697

WILLIAM H. DRUMMOND,
Plaintiff-Appellant,

v.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON AND FRENCH, a professional association,
Defendants-Appellees.

ORDER

Plaintiff-Appellant's Motion for Rehearing and the response thereto were considered by the Court, Presiding Judge Jack L. Ogg, and Judges Eino M. Jacobson and Joe W. Contreras participating.

IT IS ORDERED denying plaintiff-appellant's Motion for Rehearing.

DATED this 24th day of September, 1980.

Jack L. Ogg, Presiding Judge
Department C

ORDER DENYING PETITION FOR REVIEW

(Entered October 15, 1980)

SUPREME COURT
STATE OF ARIZONA

October 16, 1980

Supreme Court No. 15089-PR

Court of Appeals No. 1 CA-CIV 4531

Maricopa County No. C-362697

WILLIAM H. DRUMMOND,
Appellant,

vs.

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON AND FRENCH, a Professional Association,
Appellees.

"ORDERED: Petition for Review = DENIED."

Vice Chief Justice William A. Holohan and Justice Jack D. H. Hays voted to grant.

Record returned to the Court of Appeals, Division One, Phoenix, this 16th day of October, 1980.

Maryann Hopkins-Young, Clerk

MANDATE OF COURT OF APPEALS

(Issued October 24, 1980)

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1 CA-CIV 4531

DEPARTMENT C

WILLIAM H. DRUMMOND,
Plaintiff-Appellant,

v

LOUIS A. STAHL and JANE DOE STAHL, husband and wife, and STREICH, LANG, WEEKS, CARDON AND FRENCH, a Professional Association,
Defendants-Appellees.

MANDATE

TO: The Honorable Superior Court for MARICOPA County, Arizona in relation to Cause No. C-362697.

GREETING:

The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its opinion and caused the same to be filed on the 19th day of August, 1980.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order dated the 15th day of October, 1980, the Arizona Supreme Court denied the petition for review, Supreme Court No. 15089-PR.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the opinion of this Court, a copy of the opinion being attached hereto.

WITNESS, THE HONORABLE JACK L. OGG, Presiding Judge, Department C, Division One of the Court of Appeals of the State of Arizona, this 24th day of October, 1980.

Glen D. Clark, Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARS § 12-120(A)

> There is created a court of appeals which shall constitute a single court and such court shall be a court of record.

ARS § 12-120.21(A)(1)

A. The court of appeals shall have:

1. Appellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from the superior court, except criminal actions involving crimes for which a sentence of death or life imprisonment has actually been imposed.

ARS § 12-120.24

A party against whom a decision has been rendered or against whom a motion for dismissal of the action has been granted in the court of appeals may file in such court a motion for rehearing after the rendition of the decision or order of dismissal, setting forth with particularity the reasons why he believes the decision or order of dismissal erroneous. The opposite party may file his response to such motion. If the motion is denied, and the party against whom the decision or order has been rendered desires a further review by the supreme court, he shall serve upon the opposite party and file with the clerk of the division a statement that he desires such review. The clerk of the division shall thereupon transmit the record in the case to the clerk of the supreme court. The supreme court shall either grant or deny the request for review. No further briefs or oral argument shall be filed or had unless the supreme court so directs. If no request for review by the supreme court has been filed, or upon the receipt from the clerk of the supreme court of notification that the request for review has been denied, the clerk of the division shall, if the matter has been decided by formal opinion, issue the mandate of the court of appeals, if no written formal opinion has been rendered then by certified copy of the order of the court.

Title 28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

No. 80-1136

IN THE

Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,

Petitioner,

v.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife, and STREICH, LANG, WEEKS, CARDON & FRENCH A Professional Association,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEWIS AND ROCA
By John P. Frank
Walter Cheifetz
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for Respondents

No. 80-1136

IN THE

Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,
v.
LOUIS A. STAHL and MARY K. STAHL, Husband and Wife, and STREICH, LANG, WEEKS, CARDON & FRENCH A Professional Association,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a petition for writ of certiorari from a decision in the state court that there is an absolute privilege to file charges of unethical conduct with the appropriate state bar committee. The petition should be denied.

1. There is a sizable fact element in this case. Petitioner asserts that the charges filed were concededly groundless and concededly malicious. The court below noted, page 5 of Petition, that the bar investigator found the complaint to "have been brought in good faith" and that "reasonable

minds . . . could differ as to whether there existed an ethical breach." The court below found that the parallel trial court motion "was privileged under the facts of this case." *Ibid.*

2. We are cited to nothing indicating a division of authority on any federal question. There is division of authority on state questions of privilege, but not on the federal question.

3. We are cited to no case from any jurisdiction which even remotely suggests that recognition of a privilege presents a federal question. For the state's authority to "define for themselves" the privileges which preclude liability in this context, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

The court below probably rightly decided that there was more good in allowing free filings of complaints against lawyers than in inhibiting them. Whether it was correct or not, this was purely a state question to decide.

Respectfully submitted,
LEWIS AND ROCA

By John P. Frank
Walter Cheifetz

100 West Washington Street
Phoenix, Arizona 85003
(602) 262-5311

February, 1981.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

JOHN P. FRANK, being first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for respondents in this cause, that on this 4th day of February, 1981, he mailed three copies of the Brief in Opposition to Petition for Writ of Certiorari in this cause by depositing the same in the United States mail, first class postage paid, to:

Donald R. Kunz
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012

and that he also then mailed 40 copies of the Brief in Opposition to Petition for Writ of Certiorari to the Clerk of this Court in compliance with Supreme Court Rule 28.

_____
JOHN P. FRANK

SUBSCRIBED AND SWORN TO before me this 4th day of February, 1981.

_____
Notary Public

My Commission Expires:

_____

No. 80-1136

In the Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,

vs.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF ARIZONA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DONALD R. KUNZ
(Counsel of Record)
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

CONCLUSION 3

TABLE OF AUTHORITIES

Dennis v. Sparks, ... U.S. ..... (No. 79-1186) 3, 4
Gertz v. Robert Welch, Inc., 418 U.S. 323 3
Gibbes v. Zimmerman, 290 U.S. 326 3
New York Times v. Sullivan, 376 U.S. 254 3

No. 80-1136

In the Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,

vs.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF ARIZONA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The state court clothed Respondents with *two* "absolute" common law privileges:

—to maliciously and without any cause, initiate court proceedings (a matter which Respondents' Brief ignores);

—to maliciously and without any cause, initiate bar association disciplinary proceedings.

1. There *was* a "sizable" fact issue in the trial court as to Stahl's state of mind. But that issue has *evaporated.* The state court of appeals affirmed the trial court's summary judgment *despite* this "sizable fact element." To do this the state court of appeals had to ignore the fact issue and apply these *"absolute"* privileges *without regard* to the facts.

The "sizable fact element," noted by Respondents[1] is not before this court. There is no reason germane to the issues raised by the Petition why this straw issue should have even been *mentioned* in Respondents' Brief.

2. The *federal questions* raised by Petitioner—the propriety of the state granting these privileges in the face of the Fourteenth Amendment—*have never been decided by this court.*

Moreover, as Respondents admit,[2] there is a *clear division of authority at the state level.*

These uncertainties—wholly *apart* from the state's denial of Petitioner's Fourteenth Amendment rights—clearly favor grant of certiorari. The *effects* of such uncertainties on the length, cost and complexity of both civil and criminal litigation are horrendous.[3]

Respondents' Brief fails to meet this "public" question, except to opine that the court below was *"probably"* right.

3. To determine whether state recognition of a privilege presents a federal question, one need look no further than the single case cited in Respondents' Brief.[4]

---

1. Respondents' Brief, Par. 1.

2. Respondents' Brief, Par. 2.

3. In the present case, 8-10 months delay and over $100,000. (Petition, p. 6)

4. Respondents' Brief, Par. 3.

Gertz v. Robert Welch, Inc., 418 U.S. 323, and its predecessor cases (e.g., New York Times v. Sullivan, 376 U.S. 254) stand *squarely* for the proposition that the state's power to grant or withhold privileges to defendants in state common law actions are tempered, in fact *controlled*, by the Constitution.

And see *Gibbes v. Zimmerman*, 290 U.S. 326 (cited in the Petition) where a state statute purporting to grant absolute immunity to state banks against creditor's suits was held not to violate due process. This result was reached, however, *contrary* to the present case, *only* because the state provided *another remedy* which preserved to the creditors the *same substantive rights*. In the present case Petitioner was denied any remedy at all contrary to the Fourteenth Amendment.

CONCLUSION

On the *private* issues of this case Respondents have glossed over the merits, relying on the palpably incorrect argument that "this was purely a state question to decide," heedless of the Constitutional commands of due process.

On the *public* issues Respondents rest on the argument that the state court was "probably" correct.[5]

We believe that the "do-some-private-harm-for-the-greater-public-good" argument, advanced by Respondents, was effectively rejected on close facts by this court in *Dennis v. Sparks*, ... U.S. ..... (No. 79-1186).

In *Dennis* the defendants, as here, were private parties who had wrongfully initiated court proceedings. The de-

---

5. A position which was apparently not shared by two of the five sitting justices of the Supreme Court of Arizona (Petition, A23).

fendants in *Dennis*, as here, were acting under color of state law and sought, as here, absolute privilege.

The Court stated:

> . . . the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury upon other persons.

On both the private and the public issues, the Petition should be granted.

DONALD R. KUNZ
3003 North Central Avenue
Phoenix, Arizona 85012
Counsel for the Petitioner